United States
Circuit Court of Appeals
For the Ninth Circuit

W. L. CASEY and AGNES CASEY,
Appellants,

vs.

R. MAX ETTER and WILLIAM E. CULLEN,
Appellees.

No. 12287

Brief of Appellant

On Appeal From the District Court of the United States for the District of Idaho, Northern Division

HON. CHASE A. CLARK, *Judge*

W. J. NIXON,
Courthouse,
Bonners Ferry, Idaho,
GEO. W. YOUNG,
502 Paulsen Bldg.,
Spokane, Washington,
Attorneys for Appellants.

SHAW & BORDEN CO. 298412

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

This action was commenced by appellees by the filing of a complaint in and the issuance of summons from the District Court of the United States, for the Northern District of Idaho. (Tr. 2.) Appellees were and are citizens and residents of the State of Washington. Appellants were and are citizens and residents of the State of Idaho, residing at Bonners Ferry. The amount in controversy was $15,000.00. The statutory provision which sustains the jurisdiction of the District Court is 28 *U. S. C. A.* 1332. The statutory provision which sustains the jurisdiction of the Circuit Court is 28 *U. S. C. A.* 1291.

STATEMENT OF THE CASE

Summary of Pleadings

In their complaint, appellees alleged that they were attorneys at law, authorized to practice; that appellants were husband and wife, and the obligation referred to in their complaint was created in the State of Washington. They complain that on or about February 13, 1948, appellants employed them to perform legal services; that their employment was for the purpose of collecting moneys owing to appellants by others in an amount approximating $75,000.00, and that appellants agreed to pay them a reasonable sum for such services. Appellees further alleged that in pursuance of their employment, they advised and consulted with appellants concerning their interests in respect to the collection of said moneys, and that in pursuance of said employment they negotiated, recommended, framed and supervised certain contracts, instruments and proceedings and did analyze and recommend, advise and perform services for and on behalf of appellants between February 13 and June 14, 1948, with the result that appellants received from claims in *controversy* and in settlement thereof a sum of approximately $60,000.00; that the services rendered by appellees to appellants were and are of the reasonable value of $15,000.00.

Appellants, by answer, denied that they were indebted to appellees in any sum or sums whatsoever and interposed as an affirmative defense that the relationship of attorney and client never existed between them.

Upon issue thus joined, the case was tried by the Honorable Chase Clark, sitting with a jury.

Summary of Evidence

Appellant, W. L. Casey, who will hereinafter be referred to as if he were the sole appellant, was a member of a board of directors of the Sulphur Springs Gypsum Company, a Wyoming corporation. He also owned stock control of the Wyoming Mineral Products Company, a Washington corporation.

The Sulphur Springs Gypsum Company was the result of a promotion by one H. J. Adams. Adams sold stock and gave evidences of debt running from himself and the corporation to various persons. (Tr. 41, 87.) The purpose for which that corporation was organized was to mine a gypsum product in the State of Wyoming used primarily as fertilizer. Wyoming Mineral Products Company was organized by appellant and one King for the purpose, among other things, of exclusive distribution of the products of Sulphur Springs in the territory of the United States.

Adams owned or controlled a majority of the stock of the Sulphur Springs Gypsum Company. (Exs. 5-15, Tr. 38.) It had 51 stockholders. (Tr. 78.)

Some of the stockholders became disgruntled with Adams' administration of the business of Sulphur Springs. Sulphur Springs' board of directors employed appellees to investigate into its affairs. (Tr. 38, 147.) They were paid a retainer of $500.00 by Sulphur Springs. (Tr. 53, 94.) Appellant, along with

other members of the board of directors, consulted with appellees. (Tr. 41.) Adams sold stock to various persons with a guarantee that if they were dissatisfied, he would repay their investment, plus 6% interest. (Tr. 81.) Some of the directors of Sulphur Springs were interested in securing from Adams a performance of his agreement with them to refund their money, and so advised appellees. Appellees advised such directors that Sulphur Springs as a corporation could not enter into a contract or proceeding to compel Adams, the promoter, to take up their stock or pay evidences of debt running from Adams to them as individuals. Consonant with this advice, certain of the board of director members and stockholders of Sulphur Springs decided to pursue their quest for reimbursement from Adams as individuals. (Tr. 43.) Negotiations were had with Adams which ripened into a contract. (Exs. 5-15.) Exhibits 5-15 were prepared by appellees. (Tr. 48.) For the convenience of this court, we epitomize the terms of that exhibit:

Adams agreed within six months from the date of that contract, to pay to all persons signing it an amount of money stipulated therein. As a good faith guaranty, Adams agreed to deliver 50,000 shares of Sulphur Springs stock to be held by trustees named in the agreement, to be forfeited in the event he failed to perform. The parties signing the agreement, other than Adams, agreed to turn over to appellees their shares of stock and evidences of debt designated; appellees in turn were to deliver the same to Adams upon his

performance, they to make disbursements to the persons entitled thereto as set forth in the agreement.

The persons signing the contract with Adams agreed, upon performance by him, to release him from any obligation which they might have had against him as stated in the contract. Adams agreed that if he failed to perform at the end of six months, he would deliver 200,000 shares of Sulphur Springs stock to two named trustees, of which appellant was one, and in the event that he failed to deliver stock in said amount, that they would have the right to vote stock in the amount of 200,000 shares for a period of two years dating from such time when delivery should have been made. Adams agreed not to interfere with the operation of the board of directors of Sulphur Springs, nor to commence any action against them within a period of two years. The parties contracting with Adams agreed, in the event of his failure to perform, to cause Sulphur Springs to assume and pay certain obligations stated therein running to third persons.

A special provision was put into the contract as follows:

> *"That this agreement shall be binding on each and every individual who signs the same to the full extent of his obligation undertaken in this agreement, and no other."* (Italics ours.)

The final provision of the contract covered attorneys fees to be paid appellees for their services, the provision thereof being couched in the following language:

> "The said party of the first part (Adams) does also agree that the law firm of *Cullen and Etter,* 726 Paulsen Building, Spokane, Washington, *shall represent and shall perform all such services* as may be necessary in the effectuation of any part of this agreement relative to the settlement thereof by the parties of the second part and relative to the operation during the period so specified herein of the Sulphur Springs Gypsum Company; and said attorneys may accept in trust, if offered, other claims for payment by said party of the first part, including shares of stock in the said Sulphur Springs Gypsum Company, notes signed by the company or the first party, or other evidences of indebtedness so signed; and the first party does hereby agree that the services of such named attorneys shall be a legitimate claim which shall be paid at the time set for performance for the payment of claims herein by the party of the first part; and it is likewise agreed by said party of the first part that such claims shall be entitled to payment to the extent of *not less than* $4,000.00, subject to such revision as may be necessary for work done by said attorneys *which is not now contemplated by this agreement.*" (Italics and contents of parenthesis ours.)

Appellant either failed or refused to sign Exhibit 5-15. (Tr. 98, 102.) He dealt directly with Adams, entering into an option agreement with him on the 5th day of April, 1948. (Ex. 6, Tr. 50, 99.) Appellees were informed of such fact. (Tr. 98.) The option agreement was prepared by a layman, a former partner of appellant, and submitted to appellant's attorney, W. J. Nixon, for his approval. (Tr. 139.) Appellees had nothing to do with the framing or preparation of any document incident to the consummation of appellant's

sale of Wyoming Mineral Products Company's business and assets to Adams. (Tr. 102.)

Within the six-month period specified in Exhibit 5-15 for performance, Adams notified appellant and appellees that he was ready to perform the terms of that contract and the option agreement (Ex. 6), the closing of which was to take place at Billings, Montana. (Tr. 64.) Adams had found a capitalist who put up $175,000.00 for the purpose of acquiring the entire business of Sulphur Springs and Wyoming Mineral Products Company, "lock, stock and barrel."

Appellant, at the request of the president of Sulphur Springs, who was not available, asked appellees to attend the closing of the transaction at Billings for the purpose of transferring the assets of Sulphur Springs to the new purchaser. (Tr. 101.) Appellees were provided expense money by Sulphur Springs in the sum of $150.00. (Tr. 63.) Cullen, one of appellees, went to Billings on behalf of Sulphur Springs and on behalf of those stockholders who had deposited stock or evidences of debt with them. (Tr. 53.)

Appellees were paid $88,400.00, which amount equalled the sums due their clients plus interest at 6% as stipulated in Exhibits 5-15, and an attorneys fee of $4,000.00 (Tr. 54, 69), to the exclusion of payments made on appellant's option agreement, Exhibit 6.

Appellees received as an attorneys fee resulting from the transaction a sum in excess of $6,000.00. (Tr. 69.)

The additional amount above the stipulated $4,000.00 was contributed to them gratuitously by those who signed Exhibit 15.

Appellant received $52,316.00 in exchange for his performance of the option agreement, Exhibit 6, had with Adams. (Tr. 167.) The above amount was made up of $16,618.00 in cash and two personal notes of Adams in the sum of $10,000 and $2,000, respectively, one of which was delinquent at the time of trial. (Tr. 151.) $23,698.00 of the above amount was derived from an amply secured mortgage debt running from a copartnership named Anderson Brothers to the Wyoming Mineral Products Company. (Tr. 151.) Wyoming Mineral Products Company was possessed of a value of between $60,000 and $100,000. (Tr. 140, 144.) (*Appellant paid a former one-half owner of that corporation, a year prior to this transaction,* $26,000 *for his one-half interest in the corporation.*)

Appellant did not have a claim in controversy with either Sulphur Springs or H. J. Adams. He did not gain from the transaction, but sustained a substantial loss therefrom. (Tr. 151-152.) He was impelled to take such loss because of failing health. (Tr. 158.)

At the conclusion of the taking of testimony on behalf of appellees, appellants made a motion for a directed verdict. (Tr. 122.) This motion was denied by the trial court. At the conclusion of the taking of all of the testimony in the case, appellants again made a motion for a directed verdict, which motion was denied. (Tr. 170.) The jury returned its verdict in favor of

appellees in the sum of $4,000.00 (Tr. 10.) A motion for judgment *n. o. v.* or in the alternative for a new trial was timely made on behalf of appellants, and was denied by the court below. (Tr. 12, 24.) A judgment on the verdict was made and entered (Tr. 11) from which judgment this appeal is prosecuted. (Tr. 25.)

SPECIFICATIONS OF ERROR

1. The trial court erred in denying appellants' motion for a directed verdict made at the conclusion of appellees' case in chief. (Tr. 122.)

2. The trial court erred in denying appellants' motion for a directed verdict made at the conclusion of the taking of all of the testimony in this case. (Tr. 170.)

3. The trial court erred in denying appellants' motion for judgment *n. o. v.* (Tr. 24.)

4. The trial court erred in denying appellants' alternative motion for a new trial. (Tr. 24.)

5. The trial court erred in making and entering judgment on the verdict in favor of appellees. (Tr. 11.)

6. The trial court erred in admitting Exhibit 1. (Tr. 44.) Objection was made thereto on the ground that it was incompetent and immaterial. (Tr. 44.) The exhibit consisted of five pages of unsigned typewritten matter with a number of marginal writings.

7. The trial court erred in admitting over objection Exhibit 2. (Tr. 45, 46.) Objection was made thereto on the same ground as was made to Exhibit 1. (Tr. 46.) This exhibit was likewise unsigned.

8. The trial court erred in admitting over objection Exhibit 3. (Tr. 46.) Objection was made thereto

on the ground that it was incompetent and immaterial. (Tr. 46.) This exhibit was an unsigned draft of a proposed contract. (Tr. 46.)

9. The trial court erred in admitting over objection Exhibit 4. (Tr. 47.) Objection was made thereto on the ground that this exhibit was incompetent, irrelevant and immaterial. (Tr. 47.) It consisted of unsigned, typewritten sheets of paper.

10. That the verdict of the jury and judgment thereon is excessive.

SUMMARY OF ARGUMENT

Appellees' alleged contract of employment arose in the State of Washington. Such being so, substantive rights thereunder are governed by Washington law.

Legal services rendered by appellees were performed in pursuance of a clear, unambiguous written contract of employment (Ex. 5-15) fixing a fee therefor. Appellees acted upon the contract, Exhibit 5-15, thereby adopting it as their own, and were bound thereby. They were paid in full in accordance with the terms of that contract prior to the trial of this case.

Where a written contract is clear and unambiguous, it is a rule of *substantive law* that the terms thereof may not be varied by parol testimony. Appellees having alleged a contract of employment with appellants, the burden was on them to prove the same.

Appellees failed to establish that the relationship of attorney and client existed between the parties other than as disclosed in Exhibit 5-15. But if such could be gleaned from the evidence in this case, it was terminated by appellants before the rendition of services by appellees.

Under the law of the State of Washington a client may terminate the relationship of attorney and client without cause. Upon such termination, an attorney is entitled to the reasonable value of services rendered prior to termination of the employment. In this case,

there is no evidence of services rendered before termination, which occured when appellees were notified that appellants were dealing directly with Adams.

The testimony of appellees concerning Exhibits 1 to 4 consisted merely of conversations and actions antedating the written contract of employment, Exhibit 15. At most they were negotiations looking to a contract, and became merged therein, and the court committed prejudicial error in admitting such exhibits for the stated purpose of showing the amount of labor performed by appellees.

Appellant, Casey's, transactions with the appellees was in his capacity as a director of Sulphur Springs and appellants by reason thereof would not be individually bound thereby

Even though appellants may have benefited by legal services rendered by appellees for the corporation or other stockholders, such fact did not create a legal obligation on the part of appellants to pay therefor.

Appellees did not render any services other than those contemplated in Exhibit 5-15. The effect of the judgment is to award appellees double payment. Four thousand dollars is grossly in excess of what a reasonable fee would be in any event, taking into consideration the kind and nature of the services rendered, and the result.

ARGUMENT

I.

We first address ourselves to Specifications of Error 1, 2, 3, and 5.

It is our contention that the trial court should have decided as a matter of law at the conclusion of appellees' case in chief, and in any event at the conclusion of the taking of all of the testimony in this case, that appellants were not indebted to appellees.

Preliminary to a discussion of this broad contention, which if sustained by this Court is determinative of the issue, we would respectfully direct your attention to principles of law which we believe are applicable.

The contract sued upon is alleged to have been created in the State of Washington. Such being so, local law of Washington controls in all substantive matters inherent therein.

Spellman v. Bankers Trust Co., 6 F (2d) 799.

Under local law, a client has a right to discharge an attorney without cause at any time.

> "Attorneys are but representatives of the parties. Their authority is revocable at any time at the pleasure of the client, and they cannot legally object to any course their client may take concerning the matter in controversy." *Plummer v. Great Northern R. Co.*, 60 Wash. 214, 110 Pac. 989.

Hamlin v. Case & Case, Inc., 188 Wash. 150, 61 P. (2d) 1287.

When the fee is not fixed and the contracted services have not been fully performed, upon such discharge, the client is obligated to respond to the attorney in *quantum meruit. Ramey v. Graves,* 112 Wash. 88, 191 Pac. 801; *Wright v. Johansen,* 132 Wash. 682, 233 Pac. 16.

Where an attorney is informed that his client is not availing himself of his proffered services, but is dealing directly or through other persons in connection with the subject matter, such would be effective notice of an intention on the part of the client not to avail himself of such proffered services, and in the event of an employment having theretofore been effected, such would be a sufficient notice of its termination. *Wright v. Johansen,* 132 Wash. 682, 233 Pac. 16.

Where a written contract is clear and unambiguous, it may not be varied by parol testimony, *even though testimony is offered without objection* which if believed would vary its terms, the rule being that the parol evidence doctrine is part of Washington's substantive law. *Dennison v. Harden,* 29 Wn. (2d) 243, 186 P. (2d) 908; *Mead v. Anton,* Vol. 133 Wash. Dec., No. 12, p. 713.

Where a party acts upon or adopts a contract, he is bound thereby as effectively as if he signed the same.

"Although respondents did not sign the contract, by its terms it was made for their benefit; they accepted it and acted upon it, which made it their contract as effectively as if they had signed it. 13 C. J. 305; *Hunter v. Byron,* 92 Wash. 469, 159 Pac. 703." *Miskey v. Mazey,* 150 Wash. 676, at 681, 274 Pac. 698

"It is not necessary that a party should deliberately agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties, which are only consistent with the adoption of such contract. If a person conducts himself in such manner as to lead the other party to believe that he has made a contract his own and his acts are only explicable upon that theory, he will not be permitted afterwards to repudiate any of its obligations. 2 *Pom. Eq. Juris,* Sec. 965; *Chicago & A. R. Co. v. Chicago V. & W. Coal Co.,* 79 Ill. 121." *Great West. Theater Equip. v. M. & E. Theaters,* 164 Wash. 557 at 561, 3 P. (2d) 1003.

DeBritz v. Sylvia, 21 Wn. (2d) 317, 150 P. (2d) 978.

Persons acting for and on behalf of a corporation as officers thereof, and within the scope of their authority, do not bind their separate estates in the absence of a specific contract so to do. 13 *Am. Jur.* (Corporations) Sec. 1044, p. 988.

Third persons incidentally benefited by legal services rendered to a corporation or stockholders thereof are not legally bound to pay for such services. 5 *Am. Jur.* (Attorneys at Law) Sec. 155, p. 352.

An agreement made by a client with his counsel, after the latter has been employed, by which the original contract is varied and greater compensation is secured to the counsel, is invalid. 5 *Am. Jur.* (Attorneys at Law) Sec. 161, p. 358.

When we apply the foregoing principles of substantive law recognized in Washington to the facts in this case, giving due allowance to them and every reasonable inference to be drawn from them, it appears to us to be clear that appellants cannot legally be held to respond to appellees.

The most that appellees showed by their testimony was: (1) that they were practicing attorneys (Tr. 37, 84); (2) that they were approached by directors of a corporation looking to their ultimate employment by it (Tr. 38, 86); (3) that they were retained by the corporation to give it advice and consultation (Tr. 86); (4) that they advised a course of procedure to the directors (Tr. 43, 87); (5) that preliminary negotiations were had with Adams which ripened into a contract between Adams and some of the directors (Tr. 61); (6) that the contract provided for attorneys fees to be paid to appellees and specified that appellees were to perform "all legal services" incident thereto (Tr. 61, 62, 96); (7) that subsequent to the contract they knew that appellants were dealing directly with Adams (Tr. 98); (8) that appellees were asked to go to Billings (Tr. 101); (9) that they performed services while there incident to Exhibits 5-15 (Tr. 64); (10) that appellees did not perform services other or different from those

contemplated in the contract (Tr. 64, 70, 71, 72); and (11) that they were paid before the trial of this case, more than the fees stipulated in the contract, Exhibit 5-15 (Tr. 63).

Statements made to Cullen and Etter, and conversations had and testified to by them and by the witnesses Davis and Kienholz, antedating the contract, Ex. 5-15, have no evidentiary effect under Washington law for the purpose of varying the terms of Exhibit 5-15. Appellees right of recovery is controlled by their written contract, Exhibit 5-15.

The fact that appellant asked Etter to go to Billings for the purpose of assisting in closing the transaction is not evidence of a contract of employment between him and appellees. It was appellant's obligation as a director of Sulphur Springs to see to it that the purchaser legally received that which he was buying from Sulphur Springs. It was the duty of appellees, under their retainer from Sulphur Springs to supervise the transfer of its assets to the new purchaser. Appellees were paid, in addition to their original retainer of $500.00, $150.00 by the corporation for such purpose. Mr. Cullen consumed one day's time taking care of routine matters in connection with the transfer of Sulphur Springs stock and assets at Billings. The services rendered by appellees in essence consisted of nothing more than office consultation and scrivener work. The contract, Exhibits 5-15, was the product of Mr. Huntington, a Montana attorney representing Adams,

and appellees (Tr. 126). Appellees assumed no responsibility other than that ordinarily assumed by an escrow holder. The transaction did not present any novel or complex questions of law. Cullen's services at Billings did not change or alter the manner or method of performance of the contract. At Billings, Casey handled all matters pertaining to his option agreement, Ex. 6. Furthermore, he had received, before Cullen arrived in Billings, $40,000.00 of money due him or his corporation, Wyoming Mineral Products Company, by virtue of his option agreement (Ex. 6).

Appellee, Cullen, testified concerning services performed at Billings, stating:

> Q. (By Mr. Hawkins) What was the purpose of that trip?
>
> A. To collect the money due on the assignment from the Sulphur Springs Gypsum Company to the new investors.
>
> Q. Did that involve drawing corporate proceedings?
>
> A. We drew minutes for the two directors,— in Spokane to have two new ones elected, and Mr. Casey went over to have a quorum present there.
>
> Q. What did you do in Montana?
>
> A. We had an all day's conference in the office of Mr. Huntington and I received a check to myself and Mr. Etter for $88,400.00.
>
> Q. For $88,400.00?
>
> A. Yes, sir.

Q. What was that for?

A. *To represent the interest of everyone on the contract except Mr. Casey.*

Q. Did you receive any other check?

A. Yes, sir, it was handed to me.

Q. What was that?

A. $16,800.00 made out to Mr. Casey.

Q. By whom was it handed to you?

A. Mr. Charles Vandenhook.

Q. You gave it to Mr. Casey?

A. Yes, sir.

Q. Had he previously received any money?

A. A substantial amount before we went to Montana.

Q. How much?

A. He told me about $40,000.00.

* * * * *

Q. After these moneys were paid over did you have a conversation with Mr. Casey that day?

A. We had several conversations, one immediately after the money was paid over and we turned over the books and seal and stock that I had in my possession, to Mr. Huntington who represented the new Company.

Q. Was there any money transferred?

A. Mr. Casey turned over the funds he had in his possession of the Sulphur Springs Gypsum Company.

Q. Do you remember the amount of money?

A. Slightly over twenty-six hundred dollars.

Q. Were all of the assets of the Sulphur Springs Gypsum Company turned over to the new company at that time?

A. All the assets and obligations were turned over. (Tr. 53-56.) (Italics ours.)

Mr. Cullen further testified on cross-examination as follows:

Q. (By Mr. Young) Following the entering of the contract under these terms Mr. Adams went out and procured a buyer and then notified you that he was ready; that the buyer had cash arranged for and that all that was left for you to do was go to Billings, get the money and have it paid over to you, and you in turn pay it to the people whom you represented?

A. *That is correct,* but it was not as easy as you make it sound.

Q. What difficulty was there; Mr. Adams put up the money, or arranged to have you given the money and all you had to do was to make the proper receipt and put it in the bank account and pay it out to the people you represented. That was all there was to it?

A. No.

Q. What elese?

A. When we got to Billings,—well, before we got to Billings several things came up, and then we spent a whole day in Billings fighting and wrangling, and at lunch there was better than fifty per cent of the people that would not—

Mr. Young: Just a moment Mr. Cullen.

Q. Isn't it a fact that Mr. Casey had forty thousand dollars of these people's money so that they couldn't back out?

A. *Yes*, he told me he had forty thousand dollars.

Q. And they paid you the money and you put it into your account and paid it out to the clients you represented, that is, you paid them the amount you thought was coming to them, or the amount you thought was their share, isn't that correct?

A. Not what I thought was their share, what they said was their share. (Tr. 64, 65.) (Italics ours.)

From the foregoing testimony it is clear that Cullen's presence in Billings was in the interests of the Sulphur Springs Gypsum Company and persons who had delivered to appellees shares of stock and evidences of debt running from Adams or Sulphur Springs.

II.

THE COURT ERRED IN ADMITTING EXHIBITS 1 TO 4

We now address ourselves to Specifications of Error 6, 7, 8, and 9.

Appellees tried this case in the court below on the theory that they had a contract of employment between themselves and appellants; that the purpose of the employment was the *collection* of approximately $75,000 alleged to be due appellants from Adams; that such sum was in dispute; that as a result of their efforts a collection thereof was effected, and that they were entitled to a reasonable fee for their services, which they alleged to be in the sum of $15,000.00. (Tr. 2-5.)

Appellees, over objection, offered and were permitted to introduce as exhibits, Ex. 1, 2, 3, and 4. Each of these exhibits were preliminary drafts of a contract ultimately arrived at with Adams. (Tr. 44-48.) *The court stated that he was admitting the exhibits referred to for the purpose of showing the amount of labor performed by appellees.* (Tr. 46.) To the lay mind of the jury, these exhibits undoubtedly were evidence of prodigious effort on the part of appellees. The labor represented by those exhibits was not expended at the request of appellants for their benefit, but to the contrary, was at the request and for the benefit of the board of directors of Sulphur Springs. (Tr. 42-44.)

The documents referred to were preliminary scrivener efforts leading to and ultimately resulting in the final draft of a form of contract, Exhibit 5, which is identical with Exhibit 15 save the latter is an executed copy. (Tr. 127.)

Appellees, at the outset, were employed by the board of directors of Sulphur Springs for the purpose of advising them how best to proceed in dealing with Adams. (Tr. 38.) They asked and were paid a $500.00 retainer fee covering such service. (Tr. 93, 94, Ex. 14.) The purpose of the employment was to examine the books of the company and "to discuss the Sulphur Springs Gypsum set-up and what could be done about Mr. Adams." (Tr. 38.) Appellees' employment initially was brought about through the recommendation of a director named Simanton. (Tr. 146.) Simanton delivered to appellees an audit of Sulphur Springs' books. Appellees, under the retainer, examined the books, records and documents of Sulphur Springs. (Tr. 39.) They were then asked for their recommendation:

> Q. (By Mr. Hawkins) Now, what was recommended?
>
> A. (By Mr. Cullen) On Saturday, March 6, Mr. Busch, Casey, Keinholz and Davis came to the office at about two o'clock. We went over what we found in the audit; Mr. Casey advised us that he would ask Mr. Adams to come up, and a few minutes after, he came up.
>
> Q. Did you have a meeting with Adams?

A. Yes, we did. He adopted the attitude that as long as he owned the majority of the stock he felt that he could do pretty much as he wanted to. * * *

* * * * *

A. It was agreed by Mr. Adams that he would like to take over the Company and would make an attempt to liquidate what these people had in the Company. (Tr. 41-42.)

* * * * *

A. After Mr. Adams left we told Mr. Casey, Mr. Busch, Mr. Davis and Mr. Keinholz that they could not,—we advised them that in effect they couldn't do anything as Directors and that we would represent them as individuals—

Q. Why couldn't you represent them as directors?

A. They couldn't use the Company funds to get their own money back.

* * * * *

Q. And what did you recommend?

A. That a contract be drawn up with Mr. Adams to pledge a number of shares of his stock to represent that he would pay them off, or turn over to a voting trust all of the shares of stock he controlled. (Tr. 42-43.)

And then with reference to Exhibit 1, the following occurred:

Q. (By Mr. Hawkins) Handing you plaintiff's exhibit 1, will you state what it is?

A. (By Mr. Cullen) That is the first contract we drew up looking toward a liquidation of the individual's investments in the Sulphur Springs Gypsum Company.

Q. Was that drawn at the request of Mr. Casey *and his associates?*

A. Yes, sir, it was. (Tr. 41, italics ours.)

Then with respect to Exhibit 2, the following occurred:

Q. (By Mr. Hawkins) Now, Mr. Cullen, you have been handed plaintiff's exhibit 2. State what it is?

A. That is the draft which was a result of the conversation held on this contract with *various members,*—rather *with various individuals we represented.*

Q. Exhibit 2 is a result of the conferences after drawing number 1?

A. That is correct. (Tr. 45.)

With respect to Exhibit 3, the following occurred:

Q. (By Mr. Hawkins) Now, Mr. Cullen, handing you exhibit number 3 I will ask you to state what that is, if you know?

A. That is two sheets from the contract we drew concerning this same matter. This was taken up in Mr. Casey's presence. At that time *Mr. Adams had a lawyer from Billings* to represent him. * * *

* * * * *

MR. HAWKINS: I offer exhibit marked 3 in evidence at this time.

MR. YOUNG: I am making the same objection, however, in view of the statement of the Court, I understand none of these documents are binding on my client.

THE COURT: *These are just to show the amount of labor done in order to arrive at a fair fee.* It may be admitted for that purpose. The same ruling applies to the other exhibits. (Tr. 46, italics ours.)

In connection with Exhibit 4, the following occurred:

Q. (By Mr. Hawkins) Handing you exhibit number 4, will you state what that is?

A. Yes, sir, this is the contract *immediately preliminary to the final draft.* We went over this in the presence of *most all of the people we represented, including Mr. Casey and also Mr. Huntington and Adams.* * * *

* * * * *

Q. Mr. Huntington went over this with you; he representing Mr. Adams?

A. Yes, sir.

Q. Mr. Davis, Mr. Keinholz, Mr. Casey and Mr. Busch were present?

A. Yes, sir.

Q. And had copies of this instrument?

A. Yes, sir.

Q. And actively participated in the discussion of the points involved?

A. Yes, sir. * * *

MR. HAWKINS: We offer this exhibit in evidence.

MR. YOUNG: The same objection I have heretofore made. It is incompetent, irrelevant and immaterial.

THE COURT: It may be admitted for the same purpose as the other exhibits. (Tr. 47-48, italics ours.)

From the testimony of Mr. Cullen it conclusively appears that the labors represented in the preparation of the various documents, Exhibits 1 to 4 inclusive, were not solicited to be done at the request of appellant, Casey, but rather at the request of the directors and stockholders of Sulphur Springs, *including Adams, who owned or controlled more than a majority of its corporate stock.* To admit these documents for the purpose of forming a basis from which the jury could determine the reasonableness of a fee to be charged appellants was prejudicial to them and constitutes, in our opinion, reversible error. This should be doubly true where appellees were paid for such services by Sulphur Springs, and as noted hereinabove, they, by acting upon Exhibit 5-15, adopted such contract, and in Paragraph 12 thereof limited their fee *"to the extent of not less than* $4,000.00, *subject to such revision as may be necessary for work done by said attorneys which is not now contemplated by this agreement."*

THE RECORD IS SILENT AS TO ANY WORK DONE BY APPELLEES WHICH WAS NOT CONTEMPLATED BY THE AGREEMENT, EXHIBIT 5-15. THEY WERE PAID $6,000.00 BEFORE THE TRIAL OF THIS CASE. (Tr. 63.)

VERDICT AND JUDGMENT THEREON IS EXCESSIVE

We here address ourselves to the final assignment of error, No. 10.

It has been repeatedly said by writers of judicial opinions that the appellate court is not bound by the opinions of friendly experts nor by the judgment of the trial court as to what constitutes a reasonable fee in given cases.

> "Appellate courts are themselves experts as to reasonableness of attorneys fees, and may, in the interest of justice, fix fees of counsel, albeit in disagreement on the evidence with the views of the trial court." *Columbian Life Insurance v. Keyes,* 138 F (2d) 382, footnote. *Merchantile-Commerce B. & T. v. Southeast Ark. Levee,* 106 F. (2d) 960.

The appellate court is as well able to determine the reasonable value of legal services as is the trial court, and it is uninhibited in drawing its conclusion with respect thereto in relation to the facts. *Tracy v. Spitzer-Rorick Sav. & Tr. Bank,* 12 F (2d) 755; followed in *Tracy v. Spitzer-Rorick Tr. & Sav. Bank,* 12 F (2d) 758.

Appellees themselves attempted to break their legal services into two parts; one, services rendered the corporation which they contend were covered by their retainer of $500.00 (Tr. 63, 86-87), and two, those concerned with the negotiation for and preparation of

Exhibit 5-15. Aside from the trip to Billings, these services were all office in character. No litigation was undertaken or agreed to be undertaken by them. As hereinabove stated, their professional labors were the giving of office consultation, drafting of a contract and supervision of the execution of that contract, and transfer of assets therein agreed to be transferred. The responsibility they assumed was little, if any—no greater than that ordinarily assumed by a lawyer who undertakes to set down in legal form a contract arrived at by contracting parties. These services covered but a short period of time. They were all rendered between February 13 and May 6, 1948. In the absence of a specific contract fixing the amount of the fee, it would have been unconscienable to allow them a sum in excess of $1,000.00 for all of their services upon the evidence in this case. They have been paid $6,000.00, $4,000.00 of which was received by specific agreement; an additional $2,000.00 as a gratuity. To increase their fee to $10,000.00 by allowing this judgment to stand would be profligate in our opinion.

We submit that this Court should reverse the judgment of the trial court and direct it to dismiss the complaint of appellees with prejudice, or in the alternative that this Court should order and direct a new trial, or that this Court reduce the judgment obtained to an amount which in the opinion of this Court would be a fair and reasonable attorneys fee to be allowed appellees under the evidence in this case.

Respectfully submitted,

W. J. NIXON,
Courthouse,
Bonners Ferry, Idaho,

GEO. W. YOUNG,
502 Paulsen Bldg.,
Spokane, Washington,
Attorneys for Appellants